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December 20, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-254
WBNA-TV, Louisville, Kentucky
Comments of Word Broadcasting Network, Inc.

Dear Mr. Caton:

Transmitted herewith on behalf of Word Broadcasting Network, Inc., licensee of WBNA-TV, Louisville, Kentucky, is an original and four (4) copies of its Comments in response to the Notice of Inquiry, FCC 93-459, released October 7, 1993.

Should there be any questions in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Limitations on Commercial Time on Television Broadcast Stations	)	MM Docket No. 93-254

TO: The Commission

COMMENTS OF WORD BROADCASTING NETWORK, INC.

Word Broadcasting Network, Inc. ("Word"), licensee of WBNA-TV, Louisville, Kentucky, by its attorneys, hereby submits its comments in response to the above-captioned Notice of Inquiry ("NOI"), FCC 93-459, released October 7, 1993.

I. INTRODUCTION

1. WBNA, on average, airs approximately eleven and one half hours per day of Home Shopping Network ("HSN") programming and infomercials. The broadcast of this program material contributes significantly to WBNA's bottom line. The adoption of limits on a station's ability to broadcast such programming would severely and perhaps fatally affect WBNA's operations and, most likely, the operations of countless other television stations.

2. The Commission seeks comments on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. NOI at ¶ 1. Word submits that no demonstrated public interest benefit will be obtained from the establishment of commercial limits on television stations, other than those already mandated by the Children's Television Act of 1990 and implemented in Section 73.670 of the Commission's Rules.

3. The NOI marks the fifth time in the past 30 years that the Commission has considered whether it should regulate the amount of commercialization on television.[1/] In each instance, the Commission declined to interfere in the marketplace.[2/] The basis for the Commission's restraint is as valid and sound today as it was on each of the past four occasions.

II. MAJOR CHANGES IN THE VIDEO MARKETPLACE IN RECENT YEARS JUSTIFY NO COMMERCIAL LIMITS

4. In 1991, the Commission's Office of Plans and Policy issued a report painting a bleak future for the television industry:

> In the next ten years, broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some will likely go dark. The analysis supports the conclusion that in the new reality of increased competition regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over programming are no

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1/ See Notice of Proposed Rule Making, 28 Fed. Reg. 5158 (May 23, 1963); Commercial Advertising Standards, 36 FCC 45 (1964); TV Overcommercialization, 49 RR2d 391 (1981); Report and Order in MM Docket No. 83-670 ("Television Deregulation") 98 FCC 2d 1076, recon. denied, 104 FCC 2d 357 (1986), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

2/ In 1973 the Commission adopted a 16-minute "guideline" for licensees. Amendments to Delegations of Authority, 43 FCC 2d (1973). The 1984 Television Deregulation Report and Order repealed the guideline because the Commission found that "the levels of commercialization have remained significantly below the 16 minute ceiling imposed by the guideline." 98 FCC 2d at 1102.

longer justified and may impede the provision of broadcast services.[3/]

5. Further changes have occurred in the two years since the issuance of the OPP Report. The promise of 500-channel cable systems, direct broadcast satellites, the convergence of telephone companies, cable operators and the computer industry together with the design and planning of the information superhighway are evidence of the rapid changes taking place. A fourth national television network now reaches most of the country and plans exist for at least two more networks.

6. Free over-the-air television will survive, and thrive, in this competitive marketplace, but it can only survive where it is treated in the same manner as its competitors who are either unregulated or much more lightly regulated. It will not survive in a marketplace that prohibits it from engaging in the same selling practices by which its competitors are able to profit. In short, restrictions on broadcasters as proposed in the NOI will not only likely inhibit the ability of television stations such as WBNA to meet their public interest obligations, but their ability to present programming at all.

III. MARKETPLACE FORCES CONTINUE TO WORK WELL TO LIMIT THE AMOUNT OF COMMERCIAL CONTENT ON TELEVISION

7. Rather than adopt rules or guidelines, the Commission should continue to allow marketplace forces to guide broadcasters decisions concerning the amount of commercial content on televi-

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3/ F. Setzer, J. Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 FCC Rcd 3996, 3999 (1991) ("OPP Report").

sion. If such programming did not respond to a public need or interest, it would not be successful and would vanish as a result. Indeed, empirical data presented to the Commission demonstrates that "commercial level will be more effectively regulated by audience selection and market forces than by guidelines."[4/] This conclusion is as true today as it was in 1986.

8. The Commission recently found that "the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for home shopping programming."[5/] The Commission should not place itself in the position as an arbiter of good taste and no need exists for it to act in loco parentis for America's adult viewing population. The Commission should allow the marketplace to govern.

IV. PROGRAM LENGTH COMMERCIALS SERVE THE PUBLIC INTEREST

9. The adoption of any limits would require the Commission to ignore its recent determination that home shopping stations operate in the public interest and are entitled to must carry status.[6/] This decision recognized that the public interest standard is an evolving flexible one that should be permitted to keep pace with society's needs and interests. The Commission further noted in Docket 93-8 the record's demonstration that home shopping stations provide an important service to a significant

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4/ Television Deregulation, 98 FCC 2d at 1104.

5/ Report & Order in MM Docket No. 93-8, 8 FCC Rcd 5321, 5326-27 (1993), petitions for reconsideration pending.

6/ Id.

number of viewers who either do not want to or cannot shop in a more traditional manner.[7/]

10. A determination that home shopping stations operate in the public interest virtually necessitates a similar determination concerning infomercials. Program length commercials, a product of the commercial flexibility the Commission sought to encourage by its adoption of the 1984 deregulation order, much like home shopping programs, are possible only as a function of consumer interest. Thus, the principles and policies applicable to home shopping are equally applicable here.

11. The long-form commercial also provides an important service. Many goods and services simply cannot be adequately described within the context of a 30-second or one-minute commercial spot. The long form commercial format provides an outlet for such products. For example, a real estate broker presenting a long-form program allows viewers to be exposed to a large number of available properties from the comfort of their own homes. A half-hour program offering discount travel and other special interest programs on golf, cooking, fitness, and investments offer similar opportunities to viewers and provide important information to viewers about goods and services.

12. Given that our daily lives revolve around information on goods and services paid for by the offering entity -- newspapers and magazines publish multi-page advertisements, direct mailers send multi-page brochures, not to mention lengthy telephone

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[7/] Id at 5327.

solicitations -- no reason exists to hold that television stations may not present information about goods and services in a long form. As long as the viewer is informed that the information is paid commercial programming, the fact that the program is paid for by the entity offering the product does not detract from the public interest benefits flowing from such programming. A restriction on long form commercials is simply insupportable in today's multi-media, multi-channel world.

13. Additionally, the advent of home shopping and program length commercials has materially contributed to the growth and development of minority ownership, a long favored goal of the Commission. Restrictions on such programming could undo many of the gains achieved thereby and hinder or prevent future gains.

V. ANY ATTEMPT TO REGULATE COMMERCIAL SPEECH WILL BE LADEN WITH POTENTIALLY INSURMOUNTABLE CONSTITUTIONAL PROBLEMS

14. Finally, the Commission faces a difficult task in attempting to regulate commercial speech. The Commission's own 1984 Report and Order touched briefly on the constitutional problems inherent in any attempt to regulate protected commercial speech.[8/] The Commission stated that it was concerned with the "potential chilling effect on commercial speech" its guideline might effect and observed that the Supreme Court had granted significant protection to commercial speech.[9/] The Commission

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8/ Television Deregulation at pp. 1103-04.

9/ Id.

should take cognizance of its own concerns and tread carefully on this slippery slope.

15. While commercial speech enjoys a lesser level of protection than other forms of constitutionally guaranteed expression, nevertheless it has been extended first amendment protection.[10/] The Court articulated a four-factor test for commercial speech:

> At the outset we must determine whether the expression is protected by the First Amendment. (1) For commercial speech to come that within that provision, it must at least concern lawful activity and not be misleading. Next, we will ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.[11/]

The rights attendant to First Amendment status as well as the Court's guidelines concerning restrictions on protected speech must be respected.

16. The Court had occasion recently to consider the question of protected commercial speech in two contexts with different results. U.S. v. Edge Broadcasting, __ U.S. __, 113 S.Ct. 2696 (1993) (ruling that a broadcast station licensed to a community in North Carolina, which does not have a legal state lottery, could not broadcast advertisements for the legal state lottery in the neighboring State of Virginia) and Edenfield v. Fane. __ U.S. ___, 113 S.Ct. 1792 (1993) (invalidating a Florida statute prohibiting

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10/ Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 447. 455-56 (1976).

11/ Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

CPAs from directly soliciting clients). Both applied the Central Hudson test, which would be applicable to any attempt by the Commission to regulate the quantum of commercial speech on television.

17. Putting aside the question of the chilling effect on competition that a limit on commercialization would impose, see Television Deregulation, supra, at 1104, and the attendant paperwork burdens, id., the Commission would face a daunting task in attempting to (1) articulate a compelling interest in such a limit on the quantum of commercial matter and (2) fashion a rule that would impose the limit in the least restrictive manner. Commercial speech, as the Court recently noted, serves an important role in our society:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to coverage of the First Amendment.

Edenfield v. Pane, supra, at 1798 (emphasis supplied).

18. Home shopping programming and program length commercials, however, consist of more than mere "commercial" speech. The vast majority of this programming consists of both entertainment and information, thus transcending the "commercial" moniker. Thus, such programming is due even greater constitutional protection and any efforts to limit its broadcast should receive even greater scrutiny.

19. Any regulation of constitutionally protected speech must utilize the least restrictive means suitable to achieving the government's articulated, legitimate goals.[12/] Even where the government has articulated a substantial interest in regulating speech, fashioning the least restrictive means of regulating such speech is not an easy task. For example, since 1988, courts have agreed with the Commission that a substantial governmental interest exists in protecting children from indecent speech during certain hours of the broadcast day.[13/] But the Commission has, so far, been unable to craft a rule that would serve that interest in the most narrowly restrictive manner.[14/] The Commission's difficulties in the indecency arena foreshadow similar problems that will most likely be encountered in any attempt to restrict commercial matter broadcast by television stations.

IV. CONCLUSION

20. The NOI presents no data supporting a limit on commercialization. To the contrary, the available data indicates that marketplace regulation continues to work well to limit the quantity of commercial matter. No evidence suggests that even a "home shopping" format would be detrimental to the public interest or that the outright prohibition of such programming would serve a

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12/ United States v. O'Brien, 391 U.S. 367, 377 (1978).

13/ See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I").

14/ See ACT I, supra; Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"); and Action for Children's Television v. FCC ("Act III"), No. 93-1092, decided November 23, 1993, 1993 U.S. App. LEXIS 30125.

compelling government interest. Likewise, a blanket limit on commercialization in programming other than that directed to children 12 and under would serve no governmental interest. It would, as the Commission and the Court have observed, inhibit competition, impose enormous paperwork burdens and ensnare both truthful and misleading commercial speech in its net.

For the forgoing reasons, Word Broadcasting Network, Inc. respectfully recommends that the Commission take no further action in this proceeding and that it refrain once again from imposing any commercialization limits on television programming other than that directed to children 12 and under.

Respectfully Submitted,

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By _____
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December 20, 1993

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